ISSUED: March 19, 2021

BEFORE THE PUBLIC UTILITY COMMISSION

OF OREGON

UM 1953
PHASE II

In the Matter of PORTLAND GENERAL ELECTRIC COMPANY, Investigation into Proposed Green Tariff.	RULING

DISPOSITION: CONFIDENTIAL DESIGNATION REMOVED

This ruling sustains Calpine Energy Solutions, LLC's objection to Portland General Electric Company's designation of the capacity credit value, energy credit value, and the inputs used to derive those values in Attachment C to its February 5, 2021 compliance filing as protected information.

I. BACKGROUND

The Commission's general protective order governs the access and use of protected information in its proceedings. The general protective order allows a party to unilaterally designate material as protected if the party reasonably believes that the information constitutes "a trade secret or other confidential research, development, or commercial information."[1] Once designated, the information may not be used or disclosed for any purpose other than participating in the proceeding without the written permission of the designating party.

OAR 860-001-0080 explains that the general protective order does not determine whether a particular document is exempt from disclosure, but establishes a process for parties to designate information as protected and rules for parties to exchange protected information with authorized persons. A party may challenge another party's designation of information as protected by notifying the designating party, who must then show that the challenged information either falls within the scope of ORCP 36(C)(1) or is exempt from disclosure under the Public Records Law. If parties are unable to resolve a dispute about a protected designation informally, the challenging party may request a conference with an Administrative Law Judge, or file an objection to the confidential designation.

[1] ORCP 36(C)(1).

The Commission has encouraged parties to challenge the confidential designation of any publicly available information to help ensure that designations are limited and made in good faith.[2]

II. PROCEDURAL HISTORY

PGE requested a general protective order in this proceeding, which was issued as Order No. 18-260 on July 3, 2018. PGE sought a modified protective order to provide additional protection for highly commercially sensitive information related to PGE's power supply agreement, which was issued as Order No. 20-302 on September 16, 2020. On January 22, 2021, PGE submitted a compliance filing, which included the subscriber agreement, the calculation of the energy and capacity credits for the value of the resource's projected output, and the PPA price for the resource. PGE designated the information included in its compliance filing as highly confidential. Calpine and the Northwest Intermountain Power Producers Coalition (NIPPC) informally objected to PGE's designation of the calculations of the energy and capacity credit as highly confidential. On February 5, 2021, PGE submitted a revised compliance filing, changing the designation of the energy and capacity credit calculations from highly confidential under the MPO to confidential under the GPO. PGE represented that its purpose in doing so was to allow other parties' experts to check the energy and capacity credit calculations for compliance with Schedule 55 and Order No. 19-075.

On February 10, 2021, Calpine filed an objection to the confidential designation of the energy and capacity credits. PGE filed a response on February 16, 2021. On February 22, 2021, Calpine filed a reply and on February 25, 2021, PGE filed a sur-reply.

III. LEGAL STANDARD

The Commission's general protective order states, "a party may designate as Protected Information any information that the party reasonably determines: (1) Falls within the scope of ORCP 36(C)(1) (a trade secret or other confidential research, development, or commercial information); and (2) Is not publicly available." The burden is on the designating party to demonstrate that the challenged information either falls within the scope of ORCP 36(C)(1) or is exempt from disclosure under the Public Records Law. ORCP 36(C)(1) provides that "for good cause shown, the court in which the action is pending may make any order * * * that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way* * *."

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[2] *In the Matter of Sierra Club, Regarding Violation of Protective Order No. 13-095*, Docket No. UM 1707, Order No. 14-392 at 7 n 6 (Nov 6 2014).

In *Citizens' Utility Board v. Oregon Public Utilities Commission*, the Oregon Court of Appeals relied upon federal law related to the demonstration needed to warrant protection.[3] The court explained that the party seeking protective treatment must demonstrate that the information is a trade secret or confidential commercial information, and "establish good cause for the protective order by demonstrating that disclosure 'will work a clearly defined and serious injury.'" Under this standard, "broad allegations of harm unsubstantiated by specific examples or articulated reasoning do not satisfy the good cause requirement."[4]

IV. POSITIONS OF THE PARTIES

PGE argues that it designated the energy and capacity credits as confidential because public disclosure would enable the back calculation of an approximate PPA price, and that the PPA price is highly confidential. In its revised compliance filing, PGE noted that it was not changing the highly confidential designation for other information that it described highly competitive and protected by the nondisclosure agreement, including, the PPA price and cost information that could be used to derive the PPA price. PGE argues that public disclosure would result in PGE violating its obligation to protect confidential information under the terms of its agreements with suppliers.

PGE explains that the subscription price is equal to the PPA price less credits, plus admin fee, where the admin fee is generally minimal, enabling easy back calculation of the PPA price if the credits are made publicly available. Calpine disagrees that public disclosure of the credits would permit calculation of the PPA pricing, and explains that the subscription price, necessary for the calculation, remains confidential. PGE contends that because the subscription price could become public at a later date under the applicable confidentiality agreement with the subscriber, a publicly available credit value would allow entities to back-solve for the PPA price at that time. PGE argues that the now publicly available subscription rate from the first offering of Phase I could be used to solve for a reasonable estimate of PPA price for future offerings if the credits were also publicly available.

Calpine argues that PGE has not demonstrated that it will suffer a "clearly defined and serious injury" if the credit values are made public.[5] PGE contends that disclosure would provide bidders with an edge in the competitive solicitation process for procurement because the credit values would reveal the maximum price that PGE would accept. PGE

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[3] The relevant language in ORCP 36(C)(1) closely tracks the language of FRCP 26(C)(1)(g) ("requiring that a trade secret or other confidential research, development, or commercial information not be revealed or be revealed only in a specified way").

[4] 128 Or App 650, 660 (1994), citing *Zenith Radio Corporation v. Matsushita Electric Industrial Company*, 529 F Supp 866 (ED Pa 1981); *Cippolone v. Ligget Group, Inc.*, 785 F2d 1108, 1121 (3rd Cir 1986).

[5] Calpine Objection at 5, quoting 128 Or App at 658.

argues that suppliers would be able to provide PGE with a higher PPA price than they would have otherwise, leading to higher costs for cost-of-service customers. Calpine argues that making this information public would level the playing field, whereas keeping the information confidential would provide a competitive advantage to PGE, if it proposes a utility-owned resource in the program, and any previously successful suppliers. Calpine contends that, as the value against which the PPA price is netted, the credit value is an important data point to the market participants who may seek to develop future program resources. Calpine explains that public availability of the credit will assist Calpine and other potential suppliers with an important benchmark for use in future development efforts under this or any other programs that PGE might develop. PGE disputes that it would have a competitive edge in the event that it proposes a utility-owned resource within the program and contends that because PGE only provides cost of service, the price for any company-owned resources would be limited to incurred costs and allowable return, as determined by the Commission.

Calpine asserts that maintaining these credits as confidential frustrates transparency in regulatory proceedings. Calpine argues that the energy and capacity credits are "in effect, the avoided cost to PGE of the supply of energy and capacity from the generation resource" and contends that a regulated utility's avoided costs are not commercially sensitive.[6] Calpine argues that these avoided costs are no different than the many other avoided cost calculations that are publicly available. PGE disputes that the credits in Attachment C are PGE's avoided costs and explains that the energy and capacity credits are resource specific. Specifically, PGE argues that avoided costs are based on generic resources, and that these credits are calculated based on bidder supplied resource-specific information, PGE's projected hourly power prices, and any contribution that resource brings to meeting PGE's then current capacity needs.

V. DISCUSSION

Based upon my review of the parties' filings, I find that the designation of these documents as confidential should not be maintained. As the designating party, PGE has not met its burden of showing that substantial harm will result from public disclosure of the energy and capacity credits. While PGE argues that the disclosure of the credits would enable a back calculation of the PPA price in the event of a potential future disclosure of the subscriber price, the subscriber price is not presently publicly available. Additionally, although PGE argues that the subscriber price "could" become public in the future, the company does not address the likelihood or timing of this possibility. Given that the harm alleged is generally speculative, and would only be predicated on the

[6] Calpine Objection at 1.

inadvertent release of otherwise protected information, the likelihood of substantial harm has not been demonstrated in these circumstances.

Calpine's objection to designation of these documents as confidential is sustained.

Dated this 19th day of March, 2021, at Salem, Oregon.

Nolan Moser
Chief Administrative Law Judge

A party may request certification of this ruling for the Commission's consideration under OAR 860-001-1100(1). A request for certification must be filed within 15 days of the date of service of this ruling.